

Before the  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Amendments to Rules Relating to  
Non-Public Information

Docket No. RM2018-3

PUBLIC REPRESENTATIVE COMMENTS IN RESPONSE TO  
NOTICE OF PROPOSED RULEMAKING  
CONCERNING NON-PUBLIC INFORMATION

(March 23, 2018)

I. INTRODUCTION

On February 13, 2018, the Commission issued a Notice of Proposed Rulemaking to update its rules concerning the treatment of non-public information.<sup>1</sup> The Commission proposes to add a new subpart concerning information requests (proposed new Part 3001, Subpart E). It proposes conforming changes to its rules concerning Public Records and the Freedom of Information Act (FOIA) (proposed revisions to Part 3004). Finally, it proposes both substantive changes and a general restructuring of its rules concerning Non-public Materials Provided to the Commission (proposed revisions to Part 3007).

The Public Representative supports the creation of the new subpart concerning information requests. Under the current rules, this material appears out of place and is difficult to locate unless familiar with the rules. However, the Public Representative

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<sup>1</sup> Notice of Proposed Rulemaking Relating to Non-Public Information, February 13, 2018 (NPR).

suggests that the proposed rules can be vastly improved by adopting a framework for consistent use of terminology starting with this rule.

The Public Representative has no comment concerning the conforming changes to the FOIA rules other than thought should be given to how this section may impact the protection of material provided to the Commission in non-docketed matters such as meetings or consultations.

The Public Representative is in favor of the general restructuring of the rules concerning Non-public Materials Provided to the Commission. However, the Public Representative does not support changing the non-public status of materials from a maximum of ten years (unless a request for extension is granted) to what is effectively permanent non-public status (unless a request for access/disclosure is granted). The Public Representative also suggests expanding the scope of what Postal Service materials are covered by the rules. As proposed, it would appear that only materials requested by the Commission are covered. Finally, future consideration should be given to further development of rules to protect non-public information conveyed orally (meeting, consultations, etc.), or in any form other than through a document.

The Public Representative submits the following comments in response to the NPR. The Public Representative's suggested edits to the proposed rules appear in redline at the end of these comments.

## II. AREAS OF CONCERN

### A. A framework should be adopted for consistent use of terminology

Proposed § 3001.100(b) employs a circular definition. The first sentence reads:

Information, **documents**, and **things** include, but are not limited to, **things** such as explanations, confirmations, factual descriptions, data, and **documents**.

Proposed § 3001.100(b) (with emphasis added).

Further down the proposed rules introduce the term "item."

Each page, **item**, and thing, or portion thereof, of the unredacted version of the materials for which non-public treatment is sought shall be marked in a manner reasonably calculated to alert custodians to the confidential nature of the materials.

Proposed § 3007.203(a) (with emphasis added). It is not clear what the difference is between an item and a thing, or if the appearance of the term “item” is even necessary in the rule.

Throughout the proposed rules the terms “information,” “materials,” and “documents” are used somewhat interchangeably. To a casual reader, the differences may be of no consequence. However, it may add clarity if care is given to using the correct word in the context of where it is used.<sup>2</sup>

To add clarity, the Public Representative suggests adopting a framework for consistent use of terminology throughout the proposed rules.<sup>3</sup> For example, the intent of the rules should be to obtain “information,” or to protect non-public “information,” as applicable.<sup>4</sup> Information can manifest itself in the form of “documents,” “communications,” and “things.”<sup>5</sup> Collectively, these manifestations may be referred to as “materials.”<sup>6</sup> Documents can be further defined as information conveyed as “text or data, in hard copy or electronic format,” or whatever other definition the Commission finds appropriate. Similarly, communications can be further defined as information conveyed between two or more persons, including orally. Things could be further

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<sup>2</sup> For example, some rules only apply to documents, but the word “materials” (which may be a broader category than documents) is used.

<sup>3</sup> The Public Representative understands that this might not be possible in all cases, specifically in Part 3004 concerning the Freedom of Information Act.

<sup>4</sup> The Part 3001, Subpart E, rules appear to be focused on obtaining information, both public and non-public, whereas the Part 3007 rules appear to be focused on affording protection to non-public information.

<sup>5</sup> See nonrelated FRCP Rule 26(b)(5) for example. An alternative framework could be developed using the “document or other matter” terminology of 39 U.S.C. § 504(g).

<sup>6</sup> Individually, the appropriate word should be used, and not the collective “materials.”

defined as the catch-all category for information not conveyed in documents or communications.

Another distinction that should be preserved in the proposed rules is the difference between disclosing information and allowing access to materials. The subtle distinction is that prohibiting access to the materials does not necessarily mean prohibiting disclosure of the information contained therein.

The Public Representative is not concerned with the exact framework that is adopted, so long as terminology is used consistently and accurately throughout the proposed rules. Most of the proposed edits appearing in redline at the end of these comments attempt to address the issue of consistent use of terminology.

B. Indefinite protection of non-public materials does not promote transparency or accountability

The existing rules clearly terminate non-public status ten years from the date of filing. Protection only can be extended by order of the Commission, presumably of its own accord, or by motion from a person interested in the protection of the material.

Ten years after the date of filing with the Commission, non-public materials shall lose non-public status unless the Commission or its authorized representative enters an order extending the duration of that status.

39 CFR § 3007.30.

When adopting this standard, the Commission stated: “The Commission believes that a 10-year sunset provision in this instance will also serve administrative convenience and sound records management practices while adequately protecting the commercial interest of the Postal Service.”<sup>7</sup> The Commission has repeatedly made this

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<sup>7</sup> Docket No. RM2008-1, Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, March 20, 2009, at 24-25 (Order No. 194); Docket No. RM2008-1, Final Rule Establishing Appropriate Confidentiality Procedures, June 19, 2009, at 13 (Order No. 225).

position explicitly clear by stating in multiple orders “[t]he Commission has consistently denied requests for indefinite protection.” See NPR at 32 fn16.

The proposed rules purport to continue the current practice of terminating protection after ten years.

Ten years after the date of submission to the Commission, non-public materials shall lose non-public status unless otherwise provided by the Commission.

Proposed § 3007.401(a).

However, the proposed rules then add language that negates this provision. First, the proposed rules require a motion to gain access to the materials after ten years. See proposed § 3007.401(a). Second, until the motion is ruled upon, the materials continue non-public status.

Pending the resolution of the motion by the Commission, information designated as non-public will be accorded non-public treatment.

Proposed § 3007.401(d).

Thus, without a motion the materials effectively continue non-public status, and upon motion, non-public status is continued until the motion is resolved. Additionally, the proposed rules unfairly shift the burden from the person wishing to continue protection (the existing system) to the one seeking access to the materials (proposed system) by requiring the motion.<sup>8</sup> The Public Representative contends that a motion should not be necessary to obtain materials that are no longer protected, and that the burden should remain with the submitter of the materials to request an extension of non-public status.

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<sup>8</sup> The Commission should evaluate whether the proposed rules will administratively create more work for the agency. Will it be more effective to review a limited number of requests for extension of the ten year period or to review a potentially unlimited number of requests for access from an interested person seeking to promote transparency, but with no real interest in the materials?

What is most problematic is that the Commission does not explain the reasons for this major policy shift.<sup>9</sup> The sole justification appears to be the statement that “the existing rules do not set forth the mechanism for the handling of materials when non-public treatment has expired.” NPR at 32. However, even accepting this justification as true, implementing the mechanics of obtaining access is very different from instituting significant policy changes without explanation.

The Commission certainly can implement the mechanics without resorting to a rule change. For example, the Commission can, on its own, post the materials to its website upon expiration of protective conditions, or alternatively it could await an informal request (something short of a motion) before posting the materials to its website. Thus, the Public Representative concludes that the proposed rules regarding the duration of protection and the shifting of burdens do not further transparency or accountability and are not in the best interests of those concerned with maintaining a vibrant Postal Service.

In conclusion, the Public Representative does not support the proposed Part 3007, subpart D, rules that effectively continue protective conditions for non-public materials indefinitely. The existing rules facilitate transparency of the Postal Service’s actions and add to accountability as intended by the Postal Accountability and Enhancement Act (PAEA). The current policy of information losing non-public status after ten years (with the possibility of an extension) should be preserved.

C. Breadth of Postal Service materials subject to protection is too narrow

Proposed Part 3007 only applies to a narrow category of information provided by the Postal Service.<sup>10</sup> The proposed rules apply whenever:

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<sup>9</sup> If challenged, this change most likely will be found arbitrary and capricious because it is not supported in the NPR.

<sup>10</sup> The provisions applicable to persons other than the Postal Service are appropriately broad.

(a) the Postal Service claims that any document or other matter it provides to the Commission under a subpoena issued under 39 U.S.C. 504(f), or otherwise at the request of the Commission in connection with any proceeding or other purpose under title 39 of the U.S. Code, contains non-public material;

Proposed § 3007.100(a).

The Public Representative suggests that this applicability is too narrow to protect the interests of the Postal Service. As stated, the rules apply to materials obtained by “subpoena” or at the “request” of the Commission. This omits materials that the Postal Service may provide to the Commission of its own volition. This may occur when the Postal Service provides non-public material in the course of non-docketed discussions or consultations with the Commission. It is also somewhat unclear if the rule is applicable to instances where the Postal Service is providing non-public materials on its own to support its position in docketed proceedings, if the material is not requested by the Commission. A suggestion to broaden the applicability of the rule to anything claimed to contain non-public information is to strike the phrase: “under a subpoena issued under 39 U.S.C. 504(f), or otherwise at the request of the Commission.”

D. Description of who the rules apply to should be consistent

The Commission proposes to replace “third party” with “person other than the Postal Service.” NPR at 5. The Public Representative concurs that this an acceptable change. However, the proposed rules are not consistent in this usage. In several places, the rules use “other person” instead of using the complete phrase “person other than the Postal Service.” Clarity would dictate using the complete phrase.

Furthermore, the proposed rules also use “other person” to convey more than one meaning. In some places it means “person other than the Postal Service;” in other places it means “person other than the submitter.” Use of the appropriate phrase instead of the shorthand phrase would add to clarity.

- E. Future consideration should be given to extending protection to include non-public oral communications

The Public Representative suggests future development of the proposed rules to specifically include oral communication of non-public material. Non-public information presented in this format occurs frequently in Commission meetings or consultations with the Postal Service and other users of the mails.

One example where the Commission has dealt with this situation in an *ad hoc* manner is in conducting closed hearings. For example, in the past, everyone attending a closed hearing where non-public information was presented was required to sign a protective conditions document before being allowed entry.<sup>11</sup> Formalizing this procedure may be beneficial.

- F. Filing motions in closed or default “G” docket is less than convenient

Sections 3007.301(a), 3007.400(b), and 3007.401(b) state:

The motion shall be filed in the docket in which the materials were filed or in the docket in which the materials will be used; in all other circumstances, the motion shall be filed in the G docket for the applicable fiscal year.

Proposed §§ 3007.301(a), 3007.400(b), and 3007.401(b). This requirement applies whether the docket is open or closed. The current filing online system does not list closed dockets in its menu (nor the proposed “G” docket).<sup>12</sup> This information must be entered manually. Furthermore, dockets staff typically will not post documents in closed dockets without first seeking approval to do so. This could cause an additional delay in obtaining non-public information.

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<sup>11</sup> The protection of information conveyed orally brings up a host of issues that would have to be addressed in proposed rules.

<sup>12</sup> Closed dockets are not listed, partially to limit the user’s selection to active, most relevant dockets, and partially to discourage filings in closed dockets (*i.e.*, the docket is closed so it should not have any activity).



Upon implementing the proposed rules, the Public Representative suggests that the Commission update its filing online system to make it more convenient to file motions in a previously closed docket, or in the proposed default “G” docket. This can be accomplished by adding another menu for closed dockets (and the proposed “G” docket). Thought also should be given to the internal processes to seek approval before posting documents in a closed docket.

### III. LINE-BY-LINE COMMENTS ON SECTION 3001 PROPOSALS

*Proposed § 3001.100(a).* The Public Representative suggests two editorial changes to this paragraph. First, the paragraph should be divided into two sections ((1) and (2)). This should be done both for ease of reading and because the burden imposed on the two different classes of persons mentioned in the paragraph are significantly different. The Postal Service can be “required” to comply, whereas persons other than the Postal Service can only be “requested” to comply. Separating the original paragraph should make this difference more apparent.

The Public Representative suggests changing the phrase “other person” to “person other than the Postal Service” for clarity.

In keeping with the Public Representative’s proposed framework discussed above, change “information, documents, and things” to “information, and any associated documents, communications, or things.” The significance of this word choice is that an information request will always seek “information.” This information may currently exist in some form, or the Commission may ask that the information be developed. Alternatively, the Commission may also ask for specific “documents, communications, or things” that it believes contain the information that it seeks.

*Proposed § 3001.100(b).* The Public Representative suggests revising this section to be consistent with whatever framework is eventually chosen. Regardless, the circular references to documents and things must be corrected. Also, it would be helpful to define “materials” as collectively referring to documents, communications, and things.

*Proposed § 3001.101(a).* The Public Representative suggests changing the phrase “other person” to “person other than the Postal Service” for consistency. The Public Representative also proposes other wording changes for consistency with the framework referenced above.

*Proposed § 3001.101(b).* It has been the past practice of the Commission to entertain (and sometimes grant) information requests submitted orally, in addition to in writing. Oral requests typically were made in the course of a hearing before the Commission (*i.e.*, complaint or nature of service hearing). Unless the proposal is intended to change past practice (which has not been explicitly stated), the words “file” and “filing” should be changed to refer to “motion” without any indication of how the motion was presented.

The second sentence infers that the “Commission” will be evaluating the need for issuing an information request. Further down in the paragraph, it states that the Commission, the Chairman of the Commission, or the presiding officer may issue the information request. The Public Representative presumes that the Chairman of the Commission or the presiding officer can evaluate the need for issuing an information request on his or her own if he or she might be the one issuing the request without the full Commission’s involvement. A suggested clarification to accomplish this result would be to remove the word “Commission” and reword accordingly.

Finally, the Public Representative suggests simplifying the language in the third sentence. “[I]nformation request that includes all or some of the proposed questions or modifies the proposed questions” can be simplified to “information request based upon the motion.”

#### IV. LINE-BY-LINE COMMENTS ON SECTION 3004 PROPOSALS

*Proposed § 3004.30.* The Commission proposes to require the following: “In all instances that the Postal Service submits materials to the Commission that the Postal Service reasonably believes to be exempt from public disclosure, the Postal Service shall follow the procedures described in subpart B of part 3007 of this chapter.”

The Public Representative assumes that this modification will impact non-public materials disclosed to the Commission outside of a normal docketed proceeding. The Postal Service is periodically in discussions or consultations with the Commission on a variety of postal matters. These discussions/consultations frequently include the presentation of non-public materials. The impact of this rule change would appear to require the Postal Service to concomitantly file a Protective Conditions Statement on every occasion that non-public information or materials are revealed in any discussions or consultations with the Commission (or an individual Commissioner, or Commission staff). While the Public Representative is not opposed to such a requirement, this requirement should be fully explained and brought to the attention of the Postal Service.

## V. LINE-BY-LINE COMMENTS ON SECTION 3007 PROPOSALS

### A. Subpart A of Part 3007—General Provisions

*Proposed § 3007.100.* The first sentence is misleading, if not inaccurate: “The rules in this part implement provisions in 39 U.S.C. 504(g).” Section 504(g) is applicable to Postal Service materials, whereas the proposed rules also cover materials belonging to those other than the Postal Service. The Public Representative suggests either rewording or deleting this sentence.

*Proposed § 3007.100(a).* The Public Representative suggests that the applicability of the non-public materials rule is too narrow to protect the interests of the Postal Service. A suggestion to broaden the applicability of the rule is to strike the phrase: “under a subpoena issued under 39 U.S.C. 504(f), or otherwise at the request of the Commission” from the proposed rule.

*Proposed § 3007.100(b), (c), and (d).* The Public Representative suggests changing the phrase “other person” to “person other than the Postal Service” for consistency. Other clarifying language is also suggested.

*Proposed § 3007.101(a).* When attempting to define what is meant by “non-public material,” it appears that there are different definitions for materials submitted by

the Postal Service versus materials submitted by persons other than the Postal Service. The definitions are intermingled in the first two sentences of the paragraph. The Public Representative suggests separating the two definitions. State what is applicable to the Postal Service, and then separately state what is applicable to persons other than the Postal Service.

*Proposed § 3007.102.* The Public Representative suggests several changes to the wording of this rule. The concept that the Public Representative is attempting to get across is that the “disclosure” of “non-public information” is what is being protected. In most cases, this is done by preventing “access to” the “materials” that contain this information. The subtle distinction is that prohibiting access to the materials does not necessarily mean prohibiting disclosure of the information contained therein.

*Proposed § 3007.104.* As stated directly above, precise language should be used for preventing disclosure of information, or preventing access to materials.

The Commission describes the test for disclosure of non-public materials submitted by the Postal Service by stating: “the Commission shall balance the nature and extent of the likely commercial injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government entity competing in commercial markets.” In this sentence, the rule conveys a clear and concise standard. The Commission’s description of the test for disclosure of non-public materials submitted by persons other than the Postal Service is less clear. The Commission states: “the Commission shall balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).”

The Public Representative’s view is that it is much easier for a reader to understand a rule if the reader does not have to refer to other sources. Thus, it would be optimal for the Commission to clearly state what the standard is without referring to an outside source.

Regardless, the primary purpose of Federal Rule of Civil Procedure 26(c) is to describe the methods a court may use to protect non-public material. On its own, it

does not espouse a clear standard that is useful for Commission purposes.<sup>13</sup> For a reader to truly understand the “standards” contained within Federal Rule of Civil Procedure 26(c), the reader has to be well-versed in the applicable federal case law. If the Commission finds that equating a standard to Federal Rule of Civil Procedure 26(c) is appropriate, the Public Representative suggests replacing “based on Federal Rule of Civil Procedure 26(c)” with “consistent with the analysis undertaken by a federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).” This might more accurately describe what the rule is trying to convey.

B. Subpart B of Part 3007—Submitting Non-public Materials and Seeking Non-public Treatment

*Proposed § 3007.200.* The proposed rules state that an application for non-public treatment should be filed on the same business day. Thus, the Commission is accepting the risk of accidental disclosure by not being fully informed of the nature of the material until the close of the business day. The Public Representative suggests that the application should be filed at the same time, or as closely as practicable. There should be no question as to what the dockets staff should be doing with a filing. Potentially waiting to the end of a business day creates uncertainty.

The Public Representative also suggests changing the phrase “other person” to “person other than the submitter” for consistency.

*Proposed § 3007.201(b)(2).* The Public Representative suggests deleting the words “or both” because “both” is assumed unless “either/or” terminology is employed.

The Public Representative also suggests changing the phrase “other person” to “person other than the submitter” for consistency.

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<sup>13</sup> The Public Representative recognizes that Federal Rule of Civil Procedure 26(c) includes a basic standard “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” and protection of trade secrets, etc., also may be inferred.

*Proposed § 3007.202.* It appears that this rule is only applicable to documents, and not the broader category of materials. The Public Representative suggests wording changes accordingly.

*Proposed § 3007.203.* The Public Representative suggests wording changes to be consistent with the proposed structure. Specifically, suggestions are made where the rule is applicable only to documents, and not the broader category of materials.

The Public Representative also suggests deleting off-topic sentences such as:

“Spreadsheets shall display the formulas used and their links to related spreadsheets. All workpapers or data shall be filed in a form, and be accompanied by sufficient explanation and documentation, to allow them to be replicated using a publicly available PC application.”

These requirements have nothing to do with the subject matter of these rules. The Commission may want to consider consolidating these types of requirements into one section of its rules, instead of repeating various versions throughout all of the Commission’s rules.

The Public Representative suggests changing “digital video discs (DVDs)” to “digital video discs or digital versatile discs (DVDs).” This may more accurately describe the application of DVDs to storing large data files.

The Public Representative is aware that the Commission is exploring options concerning alternative systems for submitting non-public documents as contemplated by this rule. One option may be to modify the existing filing online system to accept non-public documents in a secure manner. This potentially could be available to all users with or without approval. The Commission may want to consider rewording the rule to allow for this possibility. Otherwise another rulemaking may be required in the near future.

*Proposed § 3007.204.* The Public Representative suggests changing the phrase “other person” to “person other than the submitter” for consistency.

*Proposed § 3007.205.* The Public Representative suggests three changes to this proposed rule. First, any material “could” have been filed non-publicly, deservedly or

not. It would appear that the rule should be limited to any material that “should” have been filed non-publicly.

Second, consideration should be given to broadening the limitation “in accordance with §§ 3001.9 and 3001.10 of this chapter” to include all non-public material mistakenly filed. This can be done by striking the limitation phrase.

Third, the Commission should strike the last sentence: “If any filer makes repeated use of this rule, the Secretary has discretion to impose additional requirements on this filer as necessary to ensure secure filing of non-public material.” The Public Representative has never known the Commission to encounter such a problem. It is not in the interest of the filer to make this mistake repeatedly. The Commission can always take action against anyone who abuses its rules. Finally, this type of statement is typically not used in a rule unless it is used to address a reoccurring or significant problem.

#### C. Subpart C of Part 3007—Seeking Access to Non-public Materials

*Proposed § 3007.301.* The Public Representative suggests that a motion may seek access to any type of non-public materials. As proposed, the rule only applies to documents. See proposed 3007.301(b)(1).

The Public Representative suggests changing the phrase “other person” to “person other than the submitter” for consistency. See proposed 3007.301(e).

In this same section, the Public Representative suggests rewording the FRCP terminology as discussed above.

*Proposed § 3007.302.* The Public Representative suggests stating that not only are the materials to be protected from unauthorized access, but that the information contained therein also should not be disclosed.

*Proposed § 3007.303.* The Public Representative suggests that unless every infraction of the rule will result in sanctions, the word “shall” be changed to “may.”

The Public Representative suggests that “revoking access to nonpublic materials” and “restricting access to the future provision of nonpublic materials” be added to the list of possible appropriate sanctions.

The Public Representative suggests that the use of the word “both” is unnecessary.

*Proposed § 3007.304.* The Public Representative suggests expanding access to protected materials until all Commission actions are complete after a judicial review.

D. Subpart D of Part 3007—Seeking Public Disclosure of Non-public Materials

*Proposed § 3007.400.* The Public Representative suggests several terminology changes to clarify that the rule applies to the potential public availability of non-public materials.

*Proposed § 3007.401.* The Public Representative previously discussed that the proposed rules have the effect of maintaining indefinite confidentiality of non-public materials. The suggested changes clarify that non-public status will end after ten years, and suggest a mechanism for providing access to the materials.

Respectfully submitted,

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## **List of Subjects**

### **39 CFR Part 3001**

Administrative practice and procedure, Confidential business information, Freedom of information, Sunshine Act.

### **39 CFR Part 3004**

Administrative practice and procedure, Freedom of information, Reporting and recordkeeping requirements.

### **39 CFR Part 3007**

Administrative practice and procedure, Confidential business information.

For the reasons stated in the preamble, the Commission proposes to amend chapter III of title 39 of the Code of Federal Regulations as follows:

## **Part 3001—RULES OF PRACTICE AND PROCEDURE**

1. The authority citation for part 3001 continues to read as follows:

**Authority:** 39 U.S.C. 404(d); 503; 504; 3661.

2. Add subpart E to read as follows:

### **Subpart E—Information Requests**

Sec.

3001.100 Applicability and scope.

3001.101 Information request.

### **§ 3001.100 Applicability and scope.**

(a) Applicability. The Commission may:

(1) Require ~~require~~ the Postal Service to provide any information, and any associated documents, communications, or and things, in its possession or control, or any information, and any associated documents, communications, or and things, that it can obtain through reasonable effort and expense, that are likely to materially assist the Commission in its conduct of proceedings, in its preparation of reports, or in performance of its functions under title 39 of the U.S. Code.

(2) Request ~~The Commission may request that~~ any ~~other~~ person other than the Postal Service to provide any information, and any associated documents, communications, or and things, in its possession or control, or any information, and any associated documents, communications, or and things, that it can obtain through reasonable effort and expense, that are likely to materially assist the Commission in its conduct of proceedings, in its preparation of reports, or in performance of its functions under title 39 of the U.S. Code.

(b) Scope. Information includes, but is not limited to, explanations, confirmations, factual descriptions, and data. Documents are conveyances of information such as writings, notes, graphs, charts, data files, emails; drawings; photographs; and images—stored in any medium from which information can be obtained either directly or, if necessary, after translation into a reasonably usable form. Communications are conveyances of information between two or more persons, whether oral or memorialized in some other form. Things include all other conveyances of information not considered documents or communications. Documents,

~~communications, and things shall be referred to collectively as materials. Information, documents, and things include, but are not limited to, things such as explanations, confirmations, factual descriptions, data, and documents. Examples include writings; notes; graphs; charts; spreadsheets and underlying formulae; erased, fragmented, or damaged data; data compilations or tables; emails; drawings; photographs; and images—stored in any medium from which information can be obtained either directly or, if necessary, after translation into a reasonably usable form.~~

**§ 3001.101 Information request.**

(a) An information request may be issued at the discretion of the Commission, the Chairman of the Commission, or the presiding officer seeking that the Postal Service or any ~~other~~ person other than the Postal Service provide information, or specific materials containing such information, data, or things covered by § 3001.100. An information request shall describe the ~~documents, information, and things or~~ materials sought, briefly explain the reason for the request, and specify ~~a the~~ date ~~on which~~ the response(s) ~~shall be~~ is due.

(b) Any person may request the issuance of an information request by ~~filing a~~ motion. The motion shall list the information, or specific materials containing such information, data, or things sought; explain the reasons the ~~Commission should make the~~ information request should be made, and justify why the information sought or materials are relevant and material to the Commission's duties under title 39 of the U.S. Code. At any time after the motion is ~~filed~~ made, the Commission, the Chairman of the Commission, or the presiding officer may issue an information request based upon the

~~motion. that includes all or some of the proposed questions or modifies the proposed questions.~~

## **PART 3004—PUBLIC RECORDS AND FREEDOM OF INFORMATION ACT**

3. The authority citation for part 3004 continues to read as follows:

**Authority:** 5 U.S.C. 552; 39 U.S.C. 503.

4. Amend § 3004.30, by revising the introductory text to paragraph (d) and revising paragraph (e) to read as follows:

**§ 3004.30 Relationship among the Freedom of Information Act, the Privacy Act, and the Commission's procedures for according appropriate confidentiality.**

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(d) Requesting a Postal Service record. The Commission maintains custody of records that are both Commission and Postal Service records. In all instances that the Postal Service submits materials to the Commission that the Postal Service reasonably believes to be exempt from public disclosure, the Postal Service shall follow the procedures described in subpart B of part 3007 of this chapter.

\* \* \* \* \*

(e) Requesting a record submitted under seal by a person other than the Postal Service. The Commission maintains records of a confidential nature submitted by persons other than the Postal Service as non-public materials.

(1) A request made pursuant to FOIA for records designated as non-public by a person other than the Postal Service shall be considered in light of all applicable exemptions; and

(2) A request made pursuant to part 3007 of this chapter for records designated as non-public by a person other than the Postal Service shall be considered under the applicable standards set forth in that part.

5. Amend § 3004.70, by revising the section heading and paragraphs (a), (b), and (c) to read as follows:

**§ 3004.70 Submission of non-public materials by a person other than the Postal Service.**

(a) Overlap with treatment of non-public materials. Any person who submits materials to the Commission (submitter) that the submitter reasonably believes to be exempt from public disclosure shall follow the procedures described in subpart B of part 3007 of this chapter.

(b) Notice of request. Except as provided in § 3004.30(d), if a FOIA request seeks materials designated as nonpublic materials, the Commission will provide the submitter with notice of the request. The Commission may also provide notice when it has reason to believe that materials submitted by a person other than the Postal Service are possibly exempt from disclosure and may fall within the scope of any FOIA request.

(c) Objections to disclosure. A submitter may file written objections to the request specifying all grounds for withholding the information under FOIA within 7 days

of the date of the notice. If the submitter fails to respond to the notice, the submitter will be considered to have no objection, beyond those objections articulated in its application for nonpublic treatment pursuant to § 3007.201 of this chapter, to the disclosure of the information.

\* \* \* \* \*

7. Revise part 3007 to read as follows:

## **PART 3007—NON-PUBLIC MATERIALS PROVIDED TO THE COMMISSION**

### **Subpart A—General Provisions**

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**Authority:** 39 U.S.C. 503, 504.

**Subpart A—General Provisions****§ 3007.100 Applicability.**

The rules ~~in this part~~ implement provisions ~~in of~~ 39 U.S.C. 504(g). ~~They~~ These ~~rules~~ apply whenever:

(a) the Postal Service claims that any ~~document or other matter~~ material it provides to the Commission ~~under a subpoena issued under 39 U.S.C. 504(f), or otherwise at the request of the Commission~~ in connection with any proceeding or other purpose under title 39 of the U.S. Code, contains non-public ~~material~~ information;

(b) any ~~other~~ person other than the Postal Service claims that any ~~document or other matter~~ material it ~~provided~~ s to the Commission contains non-public ~~material~~ information;

(c) the Commission is in the process of determining the appropriate degree of confidentiality to be accorded ~~information~~ material identified by the Postal Service or any ~~other~~ person other than the Postal Service to contain non-public ~~material~~ information in accordance with these rules; or

(d) the Commission is in the process of determining how to ensure appropriate confidentiality for material identified to contain non-public ~~material~~ information furnished

to the Postal Service or any ~~other~~ person other than the Postal Service in accordance with these rules.

### **§ 3007.101 Definitions.**

(a) Non-public materials means any ~~information,~~ documents, communications, or ~~and things~~ which are provided to the Commission and identified as containing non-public information. For the Postal Service this includes, but is not limited to, information that ~~are is~~ claimed to be exempt from disclosure by the Postal Service pursuant to 39 U.S.C. 410(c), 504(g), 3652(f) or 3654(f) and 5 U.S.C. 552(b). ~~or For persons other than the Postal Service, this includes information~~ claimed to be protectable under Federal Rule of Civil Procedure 26(c) by any person other than the Postal Service with a proprietary interest in the materials. ~~Non-public materials includes any information, documents, and things submitted to the Commission that are claimed to contain information that is described in 39 U.S.C. 410(c) or exempt from public disclosure under 5 U.S.C. 552(b).~~ Non-public materials cease to be non-public if the status has expired or been terminated by the Commission pursuant to this part. Except as provided by § 3007.205, non-public materials cease to be non-public if the submitter publicly ~~discloses~~ provides access to the materials with the consent of each affected person with a proprietary interest in the materials (if applicable).

(b) Submitter means any natural or legal person, including the Postal Service, that provides non-public materials to the Commission and seeks non-public treatment in accordance with the rules of this part.

### **§ 3007.102 Treatment of non-public materials.**



(a) Except as described in part 3007 or part 3004 of this chapter, the Commission will not disclose non-public information or grant access to non-public materials.

(b) To accord appropriate confidentiality to non-public materials-information during any stage of a proceeding before the Commission, or in connection with any other purpose under title 39 of the U.S. Code, the Commission may, based on Federal Rule of Civil Procedure 26(c):

- (1) Prohibit the public disclosure of the non-public materials-information;
- (2) Specify terms for public disclosure of the non-public materials-information;
- (3) Order a specific method for disclosing the non-public materials-information;
- (4) Restrict the scope of the disclosure of the non-public materials-information as they-it relates to certain matters;
- (5) Restrict who may access ~~the~~ non-public materials;
- (6) Require that a trade secret be revealed only in a specific and limited manner or to limited or specified persons; and
- (7) Order other relief as appropriate including sealing a deposition or part of a proceeding.

### **§ 3007.103 Commission action to determine non-public treatment.**

Information requests as described in subpart E of part 3001 of this chapter, preliminary notices, or interim orders may be issued to help the Commission determine the non-public treatment, if any, to be given to the materials. Upon motion by any person, or on its own motion, the Commission may issue an order containing a

description of and timeframe for the non-public treatment, if any, to be given to materials claimed by any person to be non-public. The Commission may amend the non-public treatment, if any, to be given to the materials at any time by order.

**§ 3007.104 Standard for allowing public disclosure of access to materials claimed to be non-public materials.**

(a) In determining whether to publicly disclose allow access to materials claimed by the Postal Service to be contain non-public information, the Commission shall balance the nature and extent of the likely commercial injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government entity competing in commercial markets.

(b) In determining whether to publicly disclose allow access to materials in which the Commission determines any person other than the Postal Service has a proprietary interest, the Commission shall balance the interests of the parties based on consistent with the analysis undertaken by a federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).

**Subpart B—Submitting Non-public Materials and Seeking Non-public Treatment**

**§ 3007.200 General requirements for submitting non-public materials and seeking non-public treatment.**

(a) Whenever providing non-public materials to the Commission, the submitter shall provide the following on the same business day concomitantly file: an application for non-public treatment that clearly identifies all non-public materials and describes the circumstances causing them to be submitted to the Commission in accordance with §

3007.201, a redacted (public) version of the non-public materials in accordance with § 3007.202, and an unredacted (sealed) version of the non-public materials in accordance with § 3007.203.

(b) Before submitting non-public materials to the Commission, if the submitter has reason to believe that any ~~other~~ person other than the submitter has a proprietary interest in the information contained within the non-public materials, the submitter shall inform each affected person of the nature and scope of the submission to the Commission, including the pertinent docket designation(s) (if applicable) and that the affected person may address any confidentiality concerns directly with the Commission.

**§ 3007.201 Application for non-public treatment.**

(a) Burden of persuasion. An application for non-public treatment shall fulfill the burden of persuasion that the material designated as non-public should be withheld from the public.

(b) Contents of application. An application for non-public treatment shall include a specific and detailed statement setting forth the information specified in paragraphs (b)(1)-(b)(8) of this section:

(1) The rationale for claiming that the materials are non-public, including the specific statutory provision(s) supporting the claim, and an explanation justifying application of the provision(s) to the materials.

(2) A statement of whether the submitter, ~~or any other~~ person other than the submitter has, or both have a proprietary interest in the information contained within the non-public materials, and the identification(s) specified in paragraphs (b)(2)(i)-(iii) of this

section (whichever is applicable). For purposes of this paragraph, identification means the name, phone number, and e-mail address of an individual.

(i) If the submitter has a proprietary interest in the information contained within the materials, identification of an individual designated by the submitter to accept actual notice of a motion related to the non-public materials or notice of the pendency of a subpoena or order requiring production of the materials.

(ii) If any person other than the submitter has a proprietary interest in the information contained within the materials, identification of each person who is known to have a proprietary interest in the materials-information. If such an identification is sensitive or impracticable, an explanation shall be provided along with the identification of an individual designated by the submitter to provide notice to each affected person.

(iii) If both the submitter and any ~~other~~ person other than the submitter have a proprietary interest in the information contained within the non-public materials, identification in accordance with both paragraphs (b)(2)(i) and (ii) of this section shall be provided. The submitter may designate the same individual to fulfill the requirements of paragraphs (b)(2)(i) and (ii) of this section.

(3) A description of the information contained within the materials claimed to be non-public in a manner that, without revealing the materials at issue, would allow the Commission to thoroughly evaluate the basis for the claim that the information contained within the materials are non-public.

(4) Particular identification of the nature and extent of the harm alleged and the likelihood of each harm alleged to result from disclosure.

(5) At least one specific hypothetical, illustrative example of each alleged harm.

(6) The extent of the protection from public disclosure alleged to be necessary.

(7) The length of time for which non-public treatment is alleged to be necessary with justification thereof.

(8) Any other relevant factors or reasons to support the application.

(c) Incorporation by reference. If the material designated as non-public has been previously claimed to be non-public material by a prior application for non-public treatment, the submitter may incorporate by reference the prior application. Any application that incorporates by reference a prior application that is accessible through the Commission's Web site (<http://www.prc.gov>) shall state the date, docket number, and the name of the filer of the prior application. In all other circumstances, the application that incorporates by reference a prior application shall attach the prior application.

**§ 3007.202 Redacted version of the non-public ~~materials~~ documents.**

(a) Except as allowed under paragraph (b) of this section, the submitter shall use the graphical redaction (blackout) method ~~for all to~~ redacted non-public information materials from non-public documents. The submitter shall blackout only the information materials that is claimed to be non-public.

(b) The submitter ~~shall~~ must justify using the use of any other redaction method. The application for non-public treatment shall state with particularity the competitive harm or practical difficulty alleged to result from using the blackout method. The

submitter shall specifically identify any alterations made to the unredacted version, including the location and number of lines or pages removed.

(c) If electronic, the redacted version shall be filed in a searchable format, unless the submitter certifies that doing so would be impracticable.

**§ 3007.203 Unredacted version of the non-public materials.**

(a) Each ~~page, item, and thing, document, communications, thing,~~ or portion thereof, of the unredacted version of the materials for which non-public treatment is sought shall be marked in a manner reasonably calculated to alert custodians to the confidential nature of the materials. In addition, each page of a non-public document shall be marked in this manner.

(b) The Filing Online method accessible through the Commission's Web site (<http://www.prc.gov>) described under §§ 3001.9 and 3001.10 of this chapter may not be used to submit the unredacted version of non-public materials.

~~(b)(c)~~ In lieu of §§ 3001.9 and 3001.10 of this chapter, the filing of the unredacted version of ~~the a~~ non-public ~~materials document~~ shall be made in accordance with the following requirements concerning the filing process, form, and number of copies.

(1) Except if using an alternative system approved by the Commission under paragraph (b)(2) of this section, the unredacted version of the non-public ~~materials documents~~ shall be filed in a sealed envelope clearly marked "Confidential. Do Not Post on Web" to the Office of Secretary and Administration, Postal Regulatory Commission, 901 New York Avenue NW, Suite 200, Washington, DC 20268-0001. Two

copies of the unredacted version of the non-public ~~materials~~ documents shall be filed using an electronic format such as compact discs (CDs), or digital video discs or digital versatile discs (DVDs) that shall be clearly marked "Confidential. Do Not Post on Web." ~~The non-public materials~~ Non-public documents may not be password protected. ~~Spreadsheets shall display the formulas used and their links to related spreadsheets.~~ ~~All workpapers or data shall be filed in a form, and be accompanied by sufficient explanation and documentation, to allow them to be replicated using a publicly available PC application.~~ If making an electronic unredacted version of the non-public ~~materials~~ a document is impracticable, two hard copies (paper) versions of the non-public ~~materials~~ document may be filed.

(2) ~~On behalf of the Commission, the~~ The Secretary of the Commission has authority to approve the use of a secure alternative system to file non-public ~~materials~~ documents. The Secretary may set forth any minimum requirements associated with using an alternative system. If a filer using the alternative system fails to comply with any of the Secretary's requirements, the Secretary has discretion to revoke the filer's eligibility to use the alternative system or impose requirements specific to the filer as necessary to ensure secure transmission of non-public ~~materials~~ documents.

**§ 3007.204 Protections for any ~~other~~ person other than the submitter with a proprietary interest.**

Any ~~other~~ person other than the submitter with a proprietary interest in materials that have been or will be submitted to the Commission may address any confidentiality concerns directly with the Commission by seeking non-public treatment in accordance

with the requirements of this subpart, responding to a motion for access to non-public materials in accordance with the requirements of subpart C of this part, or responding to a motion for disclosure of non-public materials in accordance with the requirements of subpart D of this part.

**§ 3007.205 Non-public materials inadvertently filed publicly.**

Any filer or person with a proprietary interest that discovers the inclusion of materials that ~~could~~should have been filed non-publicly made within a public filing ~~made in accordance with §§ 3001.9 and 3001.10 of this chapter~~ shall telephone Dockets personnel immediately to request that the non-public material be removed from the publicly available material. Upon receipt of that telephone request, Dockets personnel will remove from the publicly available material that material for which non-public treatment is being requested until the end of the next business day in order to provide the filer or person with a proprietary interest an opportunity to file an application for non-public treatment and the non-public materials in accordance with the requirements of this subpart. ~~If any filer makes repeated use of this rule, the Secretary has discretion to impose additional requirements on this filer as necessary to ensure secure filing of non-public materials.~~

**Subpart C—Seeking Access to Non-public Materials**

**§ 3007.300 Eligibility for access to non-public materials.**

(a) The following persons may access non-public materials without an order issued pursuant to § 3007.301(e):

- (1) Members of the Commission;



(2) Commission employees, including Public Representatives, carrying out their official responsibilities;

(3) Contractors, attorneys, or other non-employee subject matter experts assisting the Commission in carrying out its duties;

(4) Reviewing courts and their staffs;

(5) Court reporters, stenographers, or persons operating audio or video recording equipment for such court reporters or stenographers at hearings or depositions.

(b) No person involved in competitive decision-making for any individual or entity that might gain competitive advantage from using non-public materials shall be granted access to non-public materials. Involved in competitive decision-making includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with an individual or entity having a proprietary interest in the protected material.

(c) Any person not described in paragraphs (a) or (b) of this section may request access to non-public materials as described in § 3007.301, for the purpose of aiding participation in a pending Commission proceeding (including compliance proceedings) or aiding the initiation of a proceeding before the Commission.

**§ 3007.301 Motion for access to non-public materials.**

(a) Filing requirements. A request for access to non-public materials shall be made by filing a motion with the Commission. Any part of the motion revealing non-public ~~materials~~ information shall be filed in accordance with subpart B of this part. The motion shall be filed in the docket in which the materials were filed or in the docket in which the materials will be used; in all other circumstances, the motion shall be filed in the G docket for the applicable fiscal year.

(b) Content requirements. The motion shall:

(1) Identify the particular non-public ~~documents~~ materials to which the movant seeks access;

(2) Include a detailed statement justifying the request for access:

(i) if access is sought to aid participation in any pending Commission proceeding, the motion shall identify all proceedings (including compliance proceedings) in which the movant proposes to use the materials and how those materials are relevant to those proceedings, or

(ii) if access is sought to aid initiation of a proceeding before the Commission, the motion shall describe the subject of the proposed proceeding, how the materials sought are relevant to that proposed proceeding, and when the movant anticipates initiating the proposed proceeding;

(3) List all relevant affiliations, including employment or other relationship (including agent, consultant or contractor) with the movant, and whether the movant is affiliated with the delivery services, communications or mailing industries;

(4) Specify if actual notice of the motion has been provided to each person identified in the application pursuant to § 3007.201(b)(2). If the motion states that actual notice has been provided, the motion shall identify the individual(s) to whom actual notice was provided, the date(s) and approximate time(s) of actual notice, the method(s) of actual notice (by telephone conversation, face-to-face conversation, or an exchange of telephone or e-mail messages), and whether the movant is authorized to represent that the motion (in whole or in part) has been resolved or is contested by the submitter or any other affected person;

(5) Attach a description of protective conditions completed and signed by the movant's attorney or non-attorney representative, who may use and modify the template Protective Conditions Statement in Appendix A to this subpart; and

(6) Attach a certification to comply with protective conditions executed by each person (and any individual working on behalf of that person) seeking access, who may use and modify the template Certification to Comply with Protective Conditions in Appendix A to this subpart.

(c) Response. If actual notice of the motion was provided in advance of the filing to each person identified pursuant to § 3007.201(b)(2) by telephone conversation, face-to-face conversation, or an exchange of telephone or e-mail messages, a response to the motion is due within 3 business days of the filing of the motion, unless the Commission otherwise provides. In all other circumstances, a response to the motion is due within 7 calendar days of filing the motion, unless the Commission otherwise provides.

(d) Reply. No reply to a response shall be filed, unless the Commission otherwise provides.

(e) Commission ruling. The Commission may enter an order at any time after receiving a motion if the movant states that: actual notice has been given to each persons identified pursuant to § 3007.201(b)(2) and that the movant is authorized to represent that the motion is uncontested. In all other circumstances, the Commission will enter an order determining if access will be granted after the response period described in paragraph (c) of this section has expired. If no opposition to the motion has been filed by the submitter or any ~~other~~ person other than the submitter with a proprietary interest before the expiration of the response period described in paragraph (c) of this section, the Commission may issue an order granting access, subject to the agreed protective conditions. In determining whether to grant access to non-public materials, the Commission shall balance the balance the interests of the parties ~~based on~~ consistent with the analysis undertaken by a federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c). If access is granted, access shall commence following the issuance of the appropriate order setting forth all protective conditions.

**§ 3007.302 Non-dissemination, use, and care of non-public materials.**

(a) No person who has been granted access to non-public materials in accordance with §§ 3007.300 or 3007.301 may disseminate the materials or information contained therein in whole or in part to any person not allowed access pursuant to §§ 3007.300 or 3007.301.

(b) Persons with access to non-public materials under §§ 3007.300 or 3007.301 shall use non-public materials only for the purposes for which the non-public materials are supplied.

(c) Persons with access to non-public materials under §§ 3007.300 or 3007.301 shall protect the non-public materials from any person not granted access under §§ 3007.300 or 3007.301 by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of these materials as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially sensitive, and privileged information.

**§ 3007.303 Sanctions for violating protective conditions.**

(a) If a person who has been granted access to non-public materials under § 3007.301 violates the terms of the order granting access, the Commission ~~shall~~may impose sanctions on the person who violated the order, the persons or entities on whose behalf the person was acting, or both. The sanctions may include:

(1) Dismissing the proceeding in whole or in part;

(2) Ruling by default against the person who violated the order or the persons or entities on whose behalf the person was acting;

(3) Revoking access to nonpublic materials;

(4) Restricting access to the future provision of nonpublic materials; or ~~and~~

(3) Such other sanctions, as deemed appropriate by the Commission.

(b) This rule does not prevent any person, including the Postal Service, whose interests are damaged by the violation of an order granting access subject to protective conditions, from pursuing any remedies available under the law against the person who violated the order, or the persons or entities on whose behalf the person was acting, ~~or~~ both.

**§ 3007.304 Termination and amendment of access to non-public materials.**

(a) Termination of access.

(1) Except as provided in paragraph (b) of this section, access to non-public materials granted under § 3007.301 terminates either when the Commission issues the final order or report concluding the proceeding(s) in which the participant who filed the motion seeking access represented that the non-public materials would be used, or when the person granted access withdraws or is otherwise no longer involved in the proceeding(s), whichever occurs first. For purposes of this paragraph, an order or report is not considered final until the later of after the possibility of judicial review expires or the judicial review is complete, including the completion of any Commission response to the judicial review.

(2) Upon termination of access, all non-public materials, and any duplicates, in the possession of each person (and any individual working on behalf of that person) granted access shall be destroyed or returned to the Commission. The participant who filed the motion seeking access shall file with the Commission a notice of termination of access and attach a certification of compliance with protective conditions executed by each person (and any individual working on behalf of that person) granted access to the

non-public materials. The template Certification of Compliance with Protective Conditions and Termination of Access in Appendix A to this subpart may be used and modified to comply with this requirement.

(b) Amendment of Access. Any person may file a motion seeking to amend any protective conditions related to access of non-public materials, including extending the timeframe for which access is granted or expanding the persons to whom access is to be granted, in accordance with § 3007.301.

**§ 3007.305 Producing non-public materials in non-Commission proceedings.**

(a) If a court or other administrative agency issues a subpoena or orders production of non-public materials that a person obtained under protective conditions ordered by the Commission, the target of the subpoena or order shall, within 2 days of receipt of the subpoena or order, notify each person identified pursuant to § 3007.201(b)(2) of the pendency of the subpoena or order to allow time to object to that production or to seek a protective order or other relief.

(b) Any person that has obtained non-public materials under protective conditions ordered by the Commission and seeks to disclose the non-public materials in a court or other administrative proceeding shall make a good faith effort to obtain protective conditions at least as effective as those set forth in the Commission order establishing the protective conditions.

(c) Unless overridden by the reviewing court or other administrative agency, protective conditions ordered by the Commission will remain in effect.

**Appendix A to subpart C of part 3007—Template Forms**

### Protective Conditions Statement

\_\_\_\_\_ (name of submitter of non-public materials) requests confidential treatment of non-public materials identified as \_\_\_\_\_ (non-confidential description of non-public materials) (hereinafter “these materials”) in Commission Docket No(s). \_\_\_\_\_ (designation of docket(s) in which these materials were filed).

\_\_\_\_\_ (name of participant filing motion) (hereinafter “the movant”) requests access to these materials related to \_\_\_\_\_ (designation of docket(s) or description of proposed proceeding(s) in which these materials are to be used) (hereinafter “this matter”).

The movant has provided to each person seeking access to these materials:

- this Protective Conditions Statement,
- the Certification to Comply with Protective Conditions,
- the Certification of Compliance with Protective Conditions and Termination of Access; and
- the Commission’s rules applicable to access to non-public materials filed in Commission proceedings (subpart C of part 3007 of the U.S. Code of Federal Regulations).

Each person (and any individual working on behalf of that person) seeking access to these materials has executed a Certification to Comply with Protective Conditions by signing in ink or by typing /s/ before his or her name in the signature block. The movant attaches the Protective Conditions Statement and the executed Certification(s) to Comply with Protective Conditions to the motion for access filed with the Commission.

The movant and each person seeking access to these materials agree to comply with the following protective conditions:

1. In accordance with 39 CFR 3007.303, the Commission may impose sanctions on any person who violates these protective conditions, the persons or entities on whose behalf the person was acting, or both.
2. In accordance with 39 CFR 3007.300(b), no person involved in competitive decision-making for any individual or entity that might gain competitive advantage from using these materials shall be granted access to these materials.



Involved in competitive decision-making includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with an individual or entity having a proprietary interest in the protected material.

3. In accordance with 39 CFR 3007.302(a), a person granted access to these materials may not disseminate these materials in whole or in part to any person not allowed access pursuant to 39 CFR 3007.300(a) (Commission and court personnel) or 3007.301 (other persons granted access by Commission order) except in compliance with:

- a. Specific Commission order,
- b. Subpart B of 39 CFR 3007 (procedure for filing these materials in Commission proceedings), or
- c. 39 CFR 3007.305 (production of these materials in a court or other administrative proceeding).

4. In accordance with 39 CFR 3007.302(b) and (c), all persons granted access to these materials:

- a. must use these materials only related to this matter; and
- b. must protect these materials from any person not authorized to obtain access under 39 CFR 3007.300 or 3007.301 by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of these materials as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially sensitive, and privileged information.

5. The duties of each person granted access to these materials apply to all:

- a. Disclosures or duplications of these materials in writing, orally, electronically, or otherwise, by any means, format, or medium;
- b. Excerpts from, parts of, or the entirety of these materials;

- c. Written materials that quote or contain these materials; and
- d. Revised, amended, or supplemental versions of these materials.
- 6. All copies of these materials will be clearly marked as "Confidential" and bear the name of the person granted access.
- 7. Immediately after access has terminated pursuant to 39 CFR 3007.304(a)(1), each person (and any individual working on behalf of that person) who has obtained a copy of these materials must execute the Certification of Compliance with Protective Conditions and Termination of Access. In compliance with 39 CFR 3007.304(a)(2), the movant will attach the executed Certification(s) of Compliance with Protective Conditions and Termination of Access to the notice of termination of access filed with the Commission.
- 8. Each person granted access to these materials consents to these or such other conditions as the Commission may approve.

Respectfully submitted,

(signature of representative)

/s/

(print name of representative)

(address line 1 of representative)

(address line 2 of representative)

(telephone number of representative)

(e-mail address of representative)

(choose the appropriate response)

Attorney / Non-Attorney Representative  
for

(name of the movant)

You may delete the instructional text to complete this form. This form may be filed as an attachment to the motion for access to non-public materials under 39 CFR 3007.301(b)(5).

**Certification to Comply with Protective Conditions**

\_\_\_\_\_ (name of submitter of non-public materials) requests confidential treatment of non-public materials identified as \_\_\_\_\_ (non-confidential description of non-public materials) (hereinafter “these materials”) filed in Commission Docket No(s). \_\_\_\_\_ (designation of docket(s) in which these materials were filed).

\_\_\_\_\_ (name of participant filing motion) requests that the Commission grant me access to these materials to use related to \_\_\_\_\_ (designation of docket(s) or description of proposed proceeding(s) in which these materials are to be used) (hereinafter “this matter”).

I certify that:

- I have read and understand the Protective Conditions Statement and this Certification to Comply with Protective Conditions;
- I am eligible to receive access to these materials because I am not involved in competitive decision-making for any individual or entity that might gain competitive advantage from using these materials; and
- I will comply with all protective conditions established by the Commission.

(signature of individual receiving access)

/s/

(print name of individual receiving access)

(title of individual receiving access)

(employer of individual receiving access)

(name of the participant filing the motion)

(date)

You may delete the instructional text to complete this form. This form may be filed as an attachment to the motion for access to non-public materials under 39 CFR 3007.301(b)(6).

**Certification of Compliance with Protective Conditions and Termination of Access**

\_\_\_\_\_ (name of submitter of non-public materials) requests confidential treatment of non-public materials identified as \_\_\_\_\_ (non-confidential description of non-public materials) (hereinafter “these materials”) filed in Commission Docket No(s). \_\_\_\_\_ (designation of docket(s) in which these materials were filed).

The Commission granted the request by \_\_\_\_\_ (name of participant filing notice) to grant me access to these materials to use related to \_\_\_\_\_ (designation of docket(s) or description of proposed proceeding(s) in which these materials are to be used) (hereinafter “this matter”).

I certify that:

- I accessed, maintained, and used these materials in accordance with the protective conditions established by the Commission;
- Effective \_\_\_\_\_ (date), my access to these materials was terminated; and
- Effective \_\_\_\_\_ (date), I no longer have any of these materials or any duplicates.

(signature of individual granted access)

/s/

(print name of individual granted access)

(title of individual granted access)

(employer of individual granted access)

(name of participant filing notice)

(date)

You may delete the instructional text to complete this form. This form should be filed as an attachment to the notice of termination of access to non-public materials under 39 CFR 3007.304(a)(2).

**Subpart D—Seeking Public ~~Disclosure~~ Availability of Non-public Materials****§ 3007.400 Motion ~~for disclosure~~ seeking public availability of non-public materials.**

(a) Application of this rule. This rule applies to non-public material during the initial duration of non-public status, up to 10 years, and any non-public material for which the Commission enters an order extending the duration of that status under § 3007.401(a).

(b) Motion for ~~disclosure of~~ public availability of non-public materials. Any person may file a motion with the Commission requesting that non-public materials be made publicly ~~disclosed~~ available. Any part of the motion revealing non-public ~~materials~~ information shall be filed in accordance with subpart B of this part. The motion shall justify why the non-public materials should be made public and specifically address any pertinent rationale(s) provided in the application for non-public treatment. The motion shall specify whether actual notice of the motion has been provided to each person identified in the application pursuant to § 3007.201(b)(2). If the motion states that actual notice has been provided, the motion shall identify the individual(s) to whom actual notice was provided, the date(s) and approximate time(s) of actual notice, the method(s) of actual notice (by telephone conversation, face-to-face conversation, or an exchange of telephone or e-mail messages), and whether the movant is authorized to represent that the motion (in whole or in part) has been resolved or is contested by the submitter or any other affected person. The motion shall be filed in the docket in which the

materials were filed or in the docket in which the materials will be used; in all other circumstances, the motion shall be filed in the G docket for the applicable fiscal year.

(c) Response. If actual notice of the motion was provided in advance of the filing to each person identified pursuant to § 3007.201(b)(2) by telephone conversation, face-to-face conversation, or an exchange of telephone or e-mail messages, a response to the motion is due within 3 business days of the filing of the motion, unless the Commission otherwise provides. In all other circumstances, a response to the motion is due within 7 calendar days of filing the motion, unless the Commission otherwise provides.

(d) Reply. No reply to a response shall be filed, unless the Commission otherwise provides.

(e) Non-public treatment pending resolution. Pending the Commission's resolution of the motion, information designated as non-public will be accorded non-public treatment.

(f) Commission ruling. The Commission may enter an order at any time after receiving a motion if the movant states that: actual notice has been given to each person identified pursuant to § 3007.201(b)(2) and that the movant is authorized to represent that the motion is uncontested. In all other circumstances, the Commission will enter an order determining what non-public treatment, if any, will be given to the materials after the response period described in paragraph (c) of this section has expired. The determination of the Commission shall balance the interests of the parties as described in § 3007.104.

**§ 3007.401 Materials for which non-public treatment has expired.**

(a) Expiration of non-public treatment. Ten years after the date of submission to the Commission, non-public materials shall lose non-public status unless otherwise provided by the Commission.

(b) Upon the expiration of non-public treatment of materials, previously non-public materials will be made available to the public upon written request addressed to the Secretary of the Commission (all materials are subject to applicable retention policies). [This is but one of many possible solutions.]

~~(b) Motion for Disclosure of Materials for Which Non-Public Treatment has Expired. Any person may file a motion requesting that materials for which non-public treatment has expired under paragraph (a) of this section be publicly disclosed. Any part of the motion revealing non-public materials shall be filed in accordance with subpart B of this part. The motion shall identify the materials requested and date(s) that materials were originally submitted under seal. The motion shall specify whether actual notice of the motion has been provided to each person identified in the application pursuant to § 3007.201(b)(2). If the motion states that actual notice has been provided, the motion shall identify the individual(s) to whom actual notice was provided, the date(s) and approximate time(s) of actual notice, the method(s) of actual notice (by telephone conversation, face-to-face conversation, or an exchange of telephone or e-mail messages), and whether the movant is authorized to represent that the motion (in whole or in part) has been resolved or is contested by the submitter or any other affected person. The motion shall be filed in the docket in which the materials were filed~~

~~or in the docket in which the materials will be used; in all other circumstances, the motion shall be filed in the G docket for the applicable fiscal year. All documents are treated in accordance with the Commission's record retention schedule, which may reduce the availability of some non-public information.~~

~~(c) Response. If actual notice of the motion was provided in advance of the filing to each person identified pursuant to § 3007.201(b)(2) by telephone conversation, face-to-face conversation, or an exchange of telephone or e-mail messages, a response to the motion is due within 3 business days of the filing of the motion, unless the Commission otherwise provides. In all other circumstances, a response to the motion is due within 7 calendar days of the filing of the motion, unless the Commission otherwise provides. Any response opposing the motion shall request an extension of non-public status by including an application for non-public treatment compliant with § 3007.201. This extension application shall also include specific facts in support of any assertion that commercial injury exists despite the passage of 10 years pursuant to paragraph (a) of this section or the timeframe established by Commission order under § 3007.104.~~

~~(d) Reply. Within 7 calendar days of the filing of a response, any person (including the movant) may file a reply, unless the Commission otherwise provides.~~

~~(e) Non-public treatment pending resolution. Pending the resolution of the motion by the Commission, information designated as non-public will be accorded non-public treatment.~~

~~(f) Ruling. The Commission may grant the motion at any time after receiving a motion if the movant states that: actual notice has been given to each person identified~~



~~pursuant to § 3007.201(b)(2) and that the movant is authorized to represent that the motion is uncontested. In all other circumstances, the Commission may grant the motion at any time after the response period described in paragraph (c) of this section has expired. The Commission may deny the motion and enter an order extending the duration of non-public status at any time after the reply period described in paragraph (d) of this section has expired. The determination of the Commission shall balance the interests of the parties as described in § 3007.104.~~